Defender Heidi Ojeda, hereby submits this motion to continue the resentencing set for Janua 9, 2020 at 10:30 a.m. DATED this 18th day of December 2019. RENE L. VALLADARES Federal Public Defender By: /s/Heidi Ojeda HEIDI OJEDA Assistant Federal Public Defender	1 2	RENE L. VALLADARES Federal Public Defender Nevada State Bar No. 11479 HEIDI OJEDA		
Las Vegas, Nevada 89101 (702) 388-6577/Phone (702) 388-6577/Phone (702) 388-6577/Phone (702) 388-6261/Fax Heidi_Ojeda@fd.org Attorney for Davion Fitzgerald UNITED STATES DISTRICT COURT DISTRICT OF NEVADA UNITED STATES OF AMERICA, Plaintiff, v. Defendant Plaintiff, v. DAVION FITZGERALD, Defendant. Certification: This motion is timely filed. Defender Heidi Ojeda, hereby submits this motion to continue the resentencing set for Janua 9, 2020 at 10:30 a.m. DATED this 18th day of December 2019. RENE L. VALLADARES Federal Public Defender By: /s/Heidi Ojeda HEIDI OJEDA Accident Federal Public Defender		Nevada State Bar No. 12223		
Heidi_Ojeda@fd.org Attorney for Davion Fitzgerald UNITED STATES DISTRICT COURT DISTRICT OF NEVADA UNITED STATES OF AMERICA, Plaintiff, v. DAVION FITZGERALD, Defendant. Certification: This motion is timely filed. Defender Heidi Ojeda, hereby submits this motion to continue the resentencing set for Janua 9, 2020 at 10:30 a.m. DATED this 18th day of December 2019. RENE L. VALLADARES Federal Public Defender RENE L. VALLADARES Federal Public Defender By: /s/Heidi Ojeda HEIDI OJEDA Autorney for Davion Fitzgerald HEIDI OJEDA Autorney federal Public Defender		Las Vegas, Nevada 89101 (702) 388-6577/Phone		
UNITED STATES DISTRICT COURT DISTRICT OF NEVADA UNITED STATES OF AMERICA, Plaintiff, V. DAVION FITZGERALD, Defendant. Certification: This motion is timely filed. Defender Heidi Ojeda, hereby submits this motion to continue the resentencing set for Janua 9, 2020 at 10:30 a.m. DATED this 18th day of December 2019. RENE L. VALLADARES Federal Public Defender By: Assistant Federal Public Defender Assistant Federal Public Defender By: Assistant Federal Public Defender	6			
DISTRICT OF NEVADA UNITED STATES OF AMERICA, Plaintiff, V. DAVION FITZGERALD, Defendant. Certification: This motion is timely filed. Defender Heidi Ojeda, hereby submits this motion to continue the resentencing set for January, 200 at 10:30 a.m. DATED this 18th day of December 2019. RENE L. VALLADARES Federal Public Defender By: /s/Heidi Ojeda HEIDI OJEDA Assistant Federal Public Defender	7	Attorney for Davion Fitzgerald		
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UNITED STATES OF AMERICA, Plaintiff, V. DAVION FITZGERALD, Defendant. Certification: This motion is timely filed. Defender Heidi Ojeda, hereby submits this motion to continue the resentencing set for Janua 9, 2020 at 10:30 a.m. DATED this 18th day of December 2019. RENE L. VALLADARES Federal Public Defender By: /s/Heidi Ojeda Assistant Federal Public Defender By: /s/Heidi Ojeda	9			
Plaintiff, v. DAVION FITZGERALD, Defendant. Certification: This motion is timely filed. Defender Heidi Ojeda, hereby submits this motion to continue the resentencing set for Janua 9, 2020 at 10:30 a.m. DATED this 18th day of December 2019. RENE L. VALLADARES Federal Public Defender By: /s/Heidi Ojeda HEIDI OJEDA Assistant Federal Public Defender	10		1	
v. DAVION FITZGERALD, Defendant. Certification: This motion is timely filed. Defender Heidi Ojeda, hereby submits this motion to continue the resentencing set for Janua 9, 2020 at 10:30 a.m. DATED this 18th day of December 2019. RENE L. VALLADARES Federal Public Defender By: /s/Heidi Ojeda HEIDI OJEDA Assistant Federal Public Defender	11	UNITED STATES OF AMERICA,	Case No. 2:17-cr-00295-JCM-NJK-1	
DAVION FITZGERALD, Defendant. Certification: This motion is timely filed. Defendant Davion Fitzgerald, through his attorney of record, Assistant Federal Public Defender Heidi Ojeda, hereby submits this motion to continue the resentencing set for January 9, 2020 at 10:30 a.m. DATED this 18th day of December 2019. RENE L. VALLADARES Federal Public Defender By: /s/Heidi Ojeda HEIDI OJEDA Assistant Federal Public Defender	12	Plaintiff,		
Defendant. Certification: This motion is timely filed. Defendant Davion Fitzgerald, through his attorney of record, Assistant Federal Public Defender Heidi Ojeda, hereby submits this motion to continue the resentencing set for January 9, 2020 at 10:30 a.m. DATED this 18th day of December 2019. RENE L. VALLADARES Federal Public Defender By: /s/Heidi Ojeda HEIDI OJEDA Assistant Federal Public Defender	13	V.	<u>CONTINUE RESENTENCING</u>	
Certification: This motion is timely filed. Defendant Davion Fitzgerald, through his attorney of record, Assistant Federal Public Defender Heidi Ojeda, hereby submits this motion to continue the resentencing set for January 9, 2020 at 10:30 a.m. DATED this 18th day of December 2019. RENE L. VALLADARES Federal Public Defender By: /s/Heidi Ojeda HEIDI OJEDA Assistant Federal Public Defender	14	DAVION FITZGERALD,		
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9, 2020 at 10:30 a.m. DATED this 18th day of December 2019. RENE L. VALLADARES Federal Public Defender By: /s/Heidi Ojeda HEIDI OJEDA Assistant Federal Public Defender	18	Defendant Davion Fitzgerald, through his attorney of record, Assistant Federal Public		
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DATED this 18th day of December 2019. RENE L. VALLADARES Federal Public Defender By: /s/Heidi Ojeda HEIDI OJEDA Assistant Federal Public Defender	20	9, 2020 at 10:30 a.m.		
RENE L. VALLADARES Federal Public Defender By: /s/Heidi Ojeda HEIDI OJEDA Assistant Federal Public Defender		DATED this 18th day of December 2019.		
By: /s/Heidi Ojeda HEIDI OJEDA Assistant Federal Public Defender				
By: /s/Heidi Ojeda HEIDI OJEDA Assistant Federal Public Defender			rederal Public Defender	
HEIDI UJEDA Accietant Federal Dublic Defender		By:	/s/Heidi Ojeda	
75 Assistant I edetal I done Defender	25		HEIDI OJEDA Assistant Federal Public Defender	
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MEMORANDUM OF POINTS AND AUTHORITIES

On November 6, 2017, Defendant Davion Fitzgerald pled guilty without a plea agreement to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2). ECF Nos. 1, 20. Mr. Fitzgerald was sentenced on February 28, 2018. At the time of sentencing, the parties disputed whether Mr. Fitzgerald's prior conviction for attempted battery with substantial bodily harm was a crime of violence under U.S.S.G. 2K2.1. That this Court ultimately found that it was not a crime of violence and sentenced Mr. Fitzgerald to 37 months custody followed by 36 months of supervised release. ECF No. 32.

The Government timely appealed Mr. Fitzgerald's sentence. ECF NO. 35. On August 26, 2019, the Ninth Circuit issued its opinion vacating Mr. Fitzgerald's sentence and remanding the case for resentencing. ECF No. 41. This Court set resentencing for January 9, 2020 at 10:30 a.m. ECF No. 45. The Government applied for and was granted a Writ of Habeas Corpus ad Prosequendum to transport Mr. Fitzgerald for his resentencing. ECF No. 47.

Mr. Fitzgerald requests that this Court continue his sentencing hearing for at least 90 days to allow time to file a writ of certiorari to the United States Supreme Court. Consistent with the Ninth Circuit Rules of Appellate Procedure, appellate counsel informed Mr. Fitzgerald of his right to appeal the Ninth Circuit's adverse ruling to the Supreme Court. 9th Circuit Rules App. A, § 4(c). After discussions with counsel, Mr. Fitzgerald made the decision to file cert. The deadline for his cert petition is February 18. 2020. Typically, within 45 days of filing the petition, the Court will indicate if it has been granted or denied.

Finality concerning Mr. Fitzgerald's conviction and the need for resentencing only occurs after the Supreme Court has reviewed his petition for a writ of certiorari. *See Clay v. United States*, 537 U.S. 522, 527 (2003)("Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when

the time for filing a certiorari petition expires.") As such, Mr. Fitzgerald requests that this Court continue his resentencing hearing to allow time to file his writ of certiorari.

The government has indicated to undersigned counsel that they would oppose any request for a continuance because Mr. Fitzgerald is scheduled for release on July 5, 2020 and they are concerned that continuing the sentencing hearing could create issues if this Court ultimately decided to change Mr. Fitzgerald's sentence.

Given that Mr. Fitzgerald has the right to appeal the adverse ruling from the Ninth Circuit and that the need to resentence him only become final after the Supreme Court reviews and issues a decision concerning his writ of certiorari, this Court should grant Mr. Fitzgerald's motion to continue.

1	UNITED STATES DISTRICT COURT		
2	DISTRICT OF NEVADA		
3	UNITED STATES OF AMERICA,	Case No. 2:17-cr-295-JCM-NJK	
5	Plaintiff,	PROPOSED ORDER	
6	v. DAVION FITZGERALD,		
7 8	Defendant.		
9			
10	IT IS THEREFORE ORDERED that the resentencing hearing currently scheduled for		
11	Thursday, January 9, 2020 at 10:30 a.m., be vacated and continued to April 9, 2020 at		
12	the hour of <u>10</u> : <u>00</u> <u>a.m.</u>		
13	DATED December 20, 2019.		
14			
15	Xellus C. Mahan		
16	UNI	TED STATES DISTRICT JUDGE	
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CERTIFICATE OF ELECTRONIC SERVICE

The undersigned hereby certifies that she is an employee of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on December 18, 2019, she served an electronic copy of the above and foregoing **DEFENDANT'S MOTION TO CONTINUE RESENTENCING** by electronic mail service to the persons named below:

NICHOLAS A. TRUTANICH United States Attorney DANIEL EVAN CLARKSON Assistant United States Attorney 501 Las Vegas Blvd. South Suite 1100 Las Vegas, NV 89101

/s/ Rosana Aporta

Employee of the Federal Public Defender